No. 76-1207

In the Supreme Court of the United States

OCTOBER TERM, 1976

SANDRA L. WARD,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST JUDICIAL DISTRICT

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Petitioner prays that a writ of certiorari be issued to review the judgment of the Appellate Court of Illinois, First Judicial District, entered in this cause on April 9, 1976.

OPINION BELOW

The opinion of the Appellate Court is reported at 37 Ill. App.3d 960, 347 N.E.2d 381 (1976), and is reprinted herein as Appendix A, *infra.*

JURISDICTION

The opinion of the Appellate Court (reproduced herein as Appendix A), affirming the judgment of the Circuit Court, was entered on April 9, 1976. Leave was granted

new counsel to file a Petition for Rehearing wnich was denied on August 10, 1976. A timely Petition for Leave to Appeal to the Illinois Supreme Court from the judgment of the Appellate Court was denied on December 3, 1976. (Appendix B, *infra*) This Petition is filed within 90 days of the final order of the Illinois Supreme Court denying leave to appeal.

The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

QUESTIONS PRESENTED

1. Where a complaining witness had identified a photograph of the Petitioner prior to trial but, later, misidentified another woman as the Petitioner, was it error to allow into evidence the corroborating testimony of Officer Guynne restating the photographic identification testimony already elicited from the complaining witness?

2. Was it error to permit into evidence testimony which related to offenses other than that which was on trial?

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the Constitution provides in pertinent part:

> "No State shall • • • deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT

On August 26, 1971, the complaining witness, Mrs. Hollst, was shopping when she was approached by two young women. Pursuant to a conversation with these individuals, Mrs. Hollst fell victim to a confidence game and was bilked out of $4000.

A few weeks after the incident, Mrs. Hollst picked the Petitioner, who is caucasian, and another woman, who was black, from a series of about ten photographs shown to her by Officer Guynne.

The Petitioner, Sandra L. Ward, was arrested on a warrant on September 17, 1971. She was interrogated by Officer Guynne and ostensibly stated that "she wasn't very good at this and had messed up some of the other attempts that they had had." Guynne also testified that the Petitioner explained how the money had been divided.

Prior to trial, in a corridor outside of another courtroom, Mrs. Hollst, the complaining witness, approached a stocky woman with blond hair and mistakenly identified her as the Petitioner. Observers testified that the Petitioner did not resemble the stocky woman.

At trial, Mrs. Hollst identified the Petitioner as one of the perpetrators in the case. She also related the photographic identification she had initially made.

Officer Guynne testified to the details of his investigation which led to the Petitioner's identification and arrest over objection. He also reiterated the details of Mrs. Hollst's photographic identification and the purported admissions of the Petitioner to her prior attempts at this criminal enterprise.

The Petitioner testified in her own behalf and denied being present or participating in the crime charged. She also denied making any statements to Guynne.

The only issue at trial was the identification of the Petitioner. The Petitioner was convicted after a trial by jury, in which she was the only defendant, and sentenced to a term of imprisonment of one to three years. The Petitioner is presently enlarged on bond.

REASONS FOR GRANTING THE WRIT

1. When the sole evidence of guilt is the identification testimony of a witness, it is reversible error to admit the hearsay testimony of a police officer regarding that witness' out-of-court identification.

Officer Guynne, over objection, was permitted to explain the details of his investigation which culminated in petitioner's arrest and identification. He stated that he interviewed various unidentified individuals, one of whom provided him with an automobile license number which was registered to Charles Pigrin, later identified as the boyfriend of Patricia Plunkett, the co-defendant. After a stakeout disclosed that petitioner was an acquaintance of Pigrin and Paradise, Guynne obtained petitioner's photograph from police files and displayed it to the victim.[1] Officer Guynne stated that Mrs. Hollst identified the Petitioner's photograph, as well as that of co-defendant Paradise. (Tr. 130-6)

The Appellate Court rejected the petitioner's claim that the testimony of Officer Guynne restating identification testimony already elicited from the complainant was improper and prejudicial as bolstering the otherwise weak evidence of identification, the only credible evidence implicating the petitioner as the offender. In holding that the testimony was error, but not reversible error, the Appellate Court cited the case of *People* v. *Canale,* 52 Ill.2d 107, 285 N.E.2d

[1] Thus implying to the jury from her identification from mugshots that the petitioner had a prior criminal record when, in fact, she did not. *Cf. United States ex rel. Bleimehl* v. *Cannon,* 525 F.2d 414, 417 (7th Cir. 1975).

133 (1972) as analogous to the present situation. (App. p. 6) There, the trial judge allowed a police officer to state that the victim informed him that she saw her attacker as she came into the police station but halted the officer's rendition of the out-of-court identification when he mentioned the defendant by name and before he could testify that she identified him in the officer's presence at a show-up. The Supreme Court in *Canale* held that the admission of this testimony was error and cited *People* v. *Lukoszus,* 242 Ill. 101, 89 N.E. 749 (1909) relied upon by the petitioner in her Brief. The Supreme Court went on to hold that the error did not require reversal because of the victim's positive identification *"and the corroborative circumstances of the finding of defendant's papers at the scene."* 285 N.E.2d at 137.

In *People* v. *Davis,* 20 Ill.App.3d 948, 314 N.E.2d 723, 728 (1st Dist. 1974), the Court had occasion to explain the Illinois position:

> Our courts have held that the admission of hearsay identification testimony constitutes reversible error only when it serves as a substitute for courtroom identification *or when it is used to strengthen and corborate a weak identification.* However, if the hearsay is merely cumulative, *and is supported by a positive identification and by other corroborative circumstances,* it constitutes merely harmless error. (*People* v. *Canale,* 52 Ill.2d 107, 285 N.E.2d 133; *People* v. *Coleman,* 17 Ill.App.3d 421, 308 N.E.2d 364 (1st Dist., filed January 29, 1974) and cases cited therein. (Emphasis added).

Illinois is one of twenty-two states whose courts have adopted a similar rule declaring testimony of a third person as to an extrajudicial identification of an accused by another inadmissible. See 71 A.L.R.2d 449, § 13, N. 11.

The rule is even more compelling in those instances, as here, wherein the out-of-court identification was the product of a photographic spread. This Court long ago recognized the "vagaries of eyewitness identification" (*United States* v. *Wade,* 388 U.S. 218, 228 (1967)), and the increased hazards presented when the initial identification is acquired from photographs (*United States* v. *Simmons,* 390 U.S. 377, 383-4 (1968).

In the instant case, Mrs. Hollst had made both a prior misidentification (Tr. 141-2) and prior inconsistent statement of the description of the offender (compare Tr. 101 with the Offer of Proof at Tr. 185-8), which the petitioner attempted to establish by calling the reporting officer, Ronald Smith. (See Brief, pp. 13-14; App. p. 16) The prosecution called upon Officer Guynne to reiterate the prior out-of-court identification and, thereby, strengthen and corroborate Mrs. Hollst's testimony. This error was extremely prejudicial and not harmless for Mrs. Hollst's identification of the petitioner was neither positive nor supported by other corroborative circumstances. Cf. *People* v. *Canale,* 52 Ill.2d 107, 285 N.E.2d 133 (1972).

Citing *People* v. *Keller,* 128 Ill.App.2d 401, 263 N.E.2d 127 (1st Dist. 1970) (App. p. 18), the Appellate Court apparently held that Ms. Hollst's prior identification testimony allowed the admission of Guynne's testimony without violating the rule against hearsay evidence. However, hearsay testimony may not be offered to bolster otherwise uncorroborated testimony. *People* v. *Harrison,* 25 Ill.2d 407, 185 N.E.2d 244 (1962); *People* v. *Wright,* 65 Ill.App. 2d 23, 212 N.E.2d 126, 131 (1st Dist. 1965).

The Illinois Court's determination that Guynne's testimony was admissible because it did not violate the rule against hearsay overlooked the warning announced by this Court in *Wade, Gilbert* and *Stovall;* since Guynne's testimony served to strengthen and corroborate the weak identification testimony of a single witness, his testimony should have been excluded on the basis that its probative value was substantially outweighed by the danger of unfair prejudice. Fed. Rules Evid. Rule 403, 28 U.S.C.A.; (Cf. Opinion of Mr. Justice Fortas, *Stovall* v. *Denno,* 388 U.S. 293, 303 (1967)). The admission of Guynne's testimony compounded any error that may have been made by Mrs. Hollst in her initial identification of the petitioner and did violence to the petitioner's rights to equal protection and due process of law.

2. The admission of evidence of other offenses denied Petitioner a fair trial.

In another portion of Officer Guynne's testimony, he related to the jury, over objection, that during his interrogation petitioner exclaimed that "she wasn't very good at this and had messed up some other attempts that they had had." (Tr. 137) In ruling against the petitioner's claim that the admissions allegedly spoken by her to Officer Guynne were inadmissible because of their reference to other offenses unrelated to the offense for which the petitioner was on trial, the Appellate Court held such admissions admissible as tending to prove a fact in issue, specifically, the petitioner's "identity as one of the perpetrators of the crime." *People* v. *Dewey,* 42 Ill.2d 148, 246 N.E.2d 232 (1962). (App. p. 19)

The Appellate Court allowed the testimony under an exception to the general exclusionary rule barring such evidence, but failed to take into consideration the additional

requirement that the evidence also place the defendant in proximity to the time and place of the offense being tried. Cf. *People* v. *Manzella,* 56 Ill.2d 187, 306 N.E.2d 16, 20 (1973); *People* v. *Tranowski,* 20 Ill.2d 11, 169 N.E. 2d 347 (1960); *United States* v. *Cavallino,* 498 F.2d 1200, 1207 (5th Cir. 1974); *United States* v. *Goodwin,* 492 F.2d 1141, 1154 (5th Cir. 1974); McCormick on Evidence, § 190, p. 447, 451 (2nd Ed. 1972). The admissions attributed to the petitioner did not place her in proximity to any time or place and were inadmissible notwithstanding the exception to the general rule relied upon by the Appellate Court.

However, a much more compelling reason for excluding these statements was that they were inherently vague, unreliably reported and extremely prejudicial. Though the petitioner had never been convicted of any offense, Officer Guynne testified that while he and the petitioner were alone in an interrogation room she uttered the questionable and uncertain admissions. However, the officer's memory failed him when he was asked to recall other portions of the conversation including whether or not the petitioner ever admitted committing the crime for which she had been arrested. (Tr. 137, 154) He characterized her attitude during the questioning as cooperative even though she refused to sign a statement. (Tr. 156) The admissions were not witnessed by anyone other than the testifying officer and were not even transcribed into his case reports. (Tr. 155-8) [2] At trial, the petitioner testified that she never

[2] *Cf. Goldberg* v. *Kelly,* 397 U.S. 254, 269 (1970), where the Court stated that "[t]he second-hand presentation to the decision maker by the caseworker has its own deficiencies; since the caseworker usually gathers the facts upon which the charge of ineligibility rests, the presentation of the recipient's side of the controversy cannot safely be left to him."

made the statements and steadfastly maintained that she was not the person who defrauded Mrs. Hollst. (Tr. 168) During argument, the prosecutor capitalized upon the testimony of the admissions to buttress the weakened evidence of identification and, in his eagerness to obtain a conviction, made the admissions seem more incriminating than when originally related to Guynne. (Tr. 220; Brief, p. 42) [3]

Since the purported inculpatory remarks do not place the petitioner in proximity to the time and place of the offense and are totally devoid of any meaningful substance they do not qualify under the exception to the general rule and, therefore, are inadmissible. Moreover, the alleged admissions are not relevant or probative of any fact in issue in the instant case, that is to say whether the petitioner was the woman who defrauded Mrs. Hollst on August 26, 1971, in Maywood, Illinois. The only effect of this testimony was to depict Petitioner to the jury as an evil person who had made numerous previous attempts at theft and was disposed toward perpetrating such crimes. In fine, the State encouraged the jurors to convict Petitioner on the basis of prior offenses. *Cf. United States* v. *Fearns,* 501 F.2d 486, 490-1 (7th Cir. 1974); *People* v. *Gregory,* 22 Ill.2d 601, 177 N.E.2d 120, 122 (1961); *People* v. *Oden,* 20 Ill.2d 470, 170 N.E. 2d 582 (1960); *People* v. *Polenik,* 407 Ill. 337, 95 N.E.2d 414 (1950); Fed. Rules Evid. Rules 403, 404(b), 28 U.S.C.A.

"Guilt in a criminal case must be proved beyond a reasonable doubt and by evidence confined to that which long experience in the common-law tradition, to some extent

[3] "Well, second, we have an admission by the defendant. An admission as to what was involved in the scheme. How the money was distributed and *that this one had gone extremely well.*" (Tr. 220) (Emphasis added).

embodied in the Constitution, has crystallized into rules of evidence consistent with that standard." *Brinegar* v. *United States,* 338 U.S. 160, 174 (1948) The admission into evidence of petitioner's purported statement referring to prior offenses in conjunction with the prosecutor's erroneous reference and open reliance upon the "admission" as evidence supporting petitioner's guilt of the charged offense deprived petitioner of a fair trial and, even in a case where the evidence of guilt was overwhelming, required the reversal of the conviction. *People* v. *Gregory, supra,* 177 N.E.2d at 122.

CONCLUSION

For the foregoing reasons, this Petition for Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

OPINION OF THE APPELLATE COURT

Mr. Presiding Justice Lorenz delivered the opinion of the court:

Following a jury trial, defendant was convicted of theft by deception (Ill. Rev. Stat. 1975, ch. 38, par. 16-1(b).) and was sentenced to a term of one to three years in the custody of the Department of Corrections. On appeal, she contends that the trial court erred by (1) denying her motion for a continuance to obtain an impeaching witness, (2) admitting incriminating admissions given in violation of her *Miranda* rights, (3) admitting a police officer's hearsay testimony on an out-of-court identification of defendant made by the complaining witness, and (4) further denying her a fair trial by several evidentiary rulings.

The following evidence pertinent to this appeal was adduced at trial.

For the State:

Stella Hollst

While she was shopping at a supermarket near her home in Maywood on August 26, 1971, she became engaged in a lengthy conversation with defendant. Defendant stated that she was from California and was carrying $7,000 because she distrusted the local banks. Throughout this conversation defendant stood close to Mrs. Hollst and the store's lighting was good.

Thereafter, a third woman, Patricia Plunkett, approached and stated that she had found an envelope in a nearby telephone booth. Plunkett asked Mrs. Hollst and

defendant to witness the opening of the envelope. After Mrs. Hollst demurred, Plunkett left the store. Defendant then suggested that they should have opened the envelope to check for money. When Mrs. Hollst "got a little greedy" and agreed, defendant left and returned with Plunkett.

Plunkett opened the envelope and stated that $15,000 was inside. She offered to inquire about their rights in the money from her employer—an attorney. She then drove defendant and Mrs. Hollst near an office building and went around the corner towards the building. When she returned she said that there was $21,000 and an uncut diamond in the envelope. Plunkett proposed that they divide the money into three $6,000 shares with the remainder going to her employer. She asked defendant and Mrs. Hollst to post some earnest money as security to insure that it would not look suspicious if they suddenly possessed a large sum of money. Defendant immediately gave Plunkett a wallet supposedly containing her $7,000 withdrawal.

Thereupon Mrs. Hollst gathered her own bank books and withdrew $4,000 from two banks. Defendant accompanied her into the banks and was present when Mrs. Hollst gave her $4,000 to Plunkett.

Plunkett, defendant and Mrs. Hollst then drove back to the office building where Plunkett left to give Mrs. Hollst's $4,000 to her employer. When she returned to the automobile, Plunkett told Mrs. Hollst that she could now pick up her $6,000 share plus her $4,000 security. However, when Mrs. Hollst went to the designated office, she found a travel bureau. She quickly returned to where the automobile had been parked, but Plunkett and defendant were gone. She finished her shopping and called the police upon her return home.

Mrs. Hollst identified defendant in court as the shill in this confidence game. Although defendant's hair was red at trial, it had been blonde on August 26, 1971. She had also identified Plunkett and defendant in police photographs prior to trial.

On cross-examination, she admitted previously testifying that she was in the store at 3:00 P.M. not at 1:30 P.M. She also stated that defendant had "shoulder length hair • • • she did not have short hair."

On re-direct, she stated that her husband suffered a heart attack a few days after this incident. Defendant objected and moved for a mistrial. The trial court immediately struck the answer and denied defendant's motion.

Thereafter a hearing was held on defendant's motion to suppress certain admissions made by defendant at her initial interrogation. Defendant testified that she was not given the *Miranda* warnings. Defense counsel then called Officer Guynne who detailed his interrogatories of defendant. On cross-examination he stated he advised her, *inter alia*, that "she had the right to obtain the services of a lawyer" and that a lawyer would be appointed if she could not afford one. Defense counsel argued that defendant's admissions were induced by promises or coercion. The State argued that defendant's vague testimony and her record of prior warnings and arrests negated defendant's arguments. The trial court denied motion to suppress.

Jeffery Guynne

He was a Maywood police officer on August 26, 1971. His investigation led him to suspect Patricia Plunkett. He took approximately ten photographs to Mrs. Hollst and she identified Plunkett and defendant. During his interrogation of defendant she stated that "she wasn't

very good at this and had messed up some of the other attempts that they had had." Defendant also admitted that "she split fifty-fifty with Patricia Plunkett and then had to split fifty-fifty, her share, with Charles Pigrin."

At the conclusion of the State's case, defendant moved for a continuance in order to bring Sergeant Ronald Smith into court to testify to a description of defendant in his police report as having *short* blonde hair. The trial court denied the motion after specifically finding that defendant had the report for several days prior to trial and that it was not impeaching, in any event, since it did not indicate that Mrs. Hollst had given the description.

For Defendant:

Edward Genson

He is an attorney who represented Plunkett at a preliminary proceeding. He happened to walk into the courthouse hallway with Mrs. Hollst. She incorrectly identified a tall, stocky woman with blonde hair as being the defendant.

The State later introduced the appearance filed by Genson on defendant's behalf in this case.

Defendant Sandra Ward on her own behalf

She denied committing the crime or making any admissions to the police. She was "probably at home" on the day of the crime.

On cross-examination, she denied knowing Patricia Plunkett, but later admitted that her friend, Patricia Paradise, was also known as Patricia Plunkett.

OPINION

Defendant first contends that the trial court erred by denying her motion for a continuance to obtain an impeaching witness. Motions for a continuance are within the sound discretion of the trial court and must be considered in light of the diligence shown by the movant. (Ill. Rev. Stat. 1975, ch. 38, par. 114-4(e); *People* v. *Hicks,* 125 Ill. App. 2d 48, 259 N.E.2d 846.) In the instant case, defendant made a belated attempt to subpoena a policeman to testify to a conflicting description of defendant's hair length. The record clearly shows that defendant had the police report for several days prior to trial. We cannot say that defendant was surprised by this arguably conflicting testimony since her main defense was an attack upon the complaining witness's identification of herself as the shill in the con game, and, thus, the importance of all possible identification witnesses could have been forseen prior to trial. Since defendant failed to show due diligence in having a witness who was crucial to that initial identification available to testify when her main defense involved her identification, we believe the trial court acted within its proper discretionary powers and we reject defendant's initial contention.

Defendant next contends that the trial court erred by admitting incriminating admissions given in violation of her *Miranda* rights. She argues that Officer Glynne's admonition that she had the right to an attorney was insufficient since it failed to apprise her that she had the right to the attorney during the interrogation. In a similar situation, our Supreme Court held the warning that defendant had the right to have "an attorney present" satisfied the constitutional prerequisites. (*People* v. *Prim,* 53 Ill. 2d 62, 289 N.E.2d 601, *cert. denied,* 412 U.S. 918, 37 L.Ed.2d 144, 93 S.Ct. 2731.) Since we believe that defendant's second contention is controlled by *Prim,* we quote directly from the rationale of that case:

"It would be a strained construction of the language used by the detective to say that it conveyed a meaning that an attorney would be furnished at some future time. All of the warnings related to the giving of a statement. One part thereof viewed by itself may be subject to a different interpretation but when viewed in the context of the entire discussion it can only refer to the right to have counsel provided for the defendant at the time of the interrogation." *People* v. *Prim,* 53 Ill. 2d 62, 67, 289 N.E.2d 601, 605.

Defendant also contends that the trial court erred by admitting Officer Guynne's hearsay testimony on an out-of-court identification of defendant made by the complaining witness. She argues that the testimony bolstered the otherwise weak in-court identification by Mrs. Hollst. In *People* v. *Lukoszus,* 242 Ill. 101, 89 N.E. 749, the court reversed a conviction for murder holding that the admission of an officer's hearsay testimony on the complaining witness's identification constituted reversible error. However, our Supreme Court has held similar testimony to be error, but not reversible error, in more recent cases involving like circumstances. (*People* v. *Canale,* 52 Ill. 2d 107, 285 N.E.2d 133; *People* v. *Sterling,* 341 Ill. 112, 173 N.E. 139.) Moreover, we believe that when the declarant is present in court and subject to cross-examination, as Mrs. Hollst was in this case, the trustworthiness of the testimony can be readily established, and the basic rationale behind the exclusion of the hearsay is circumvented. (*People* v. *Keller,* 128 Ill. App. 2d 401, 263 N.E.2d 127, see, Fed. Rules Evid. Rule 801(c), 28 U.S.C.A.) We conclude, therefore, that the trial court did not err by admitting this testimony.

Finally, defendant contends that she was denied a fair trial by several evidentiary rulings. The trial court sustained objections to State questions and to certain testi-

mony concerning Mr. Hollst's heart attack, Patricia Plunkett's record of prior offenses, and certain investigatory findings. The jury was instructed to disregard these matters in its deliberations. After carefully scrutinizing the record, we are convinced the questions and testimony do not constitute reversible error when viewed in the proper perspective of the entire trial record. *See, People* v. *Dukett,* 56 Ill. 2d 432, 308 N.E.2d 590, *cert. denied,* 419 U.S. 965, 42 L.Ed. 2d 180, 95 S.Ct. 226; *People* v. *Wilson,* 51 Ill. 2d 302, 281 N.E.2d 626.

Defendant's argument that her admission was inadmissible evidence of prior offenses cannot be sustained. Generally, evidence of other crimes committed by a defendant is irrelevant and inadmissible. (*People* v. *Oden,* 20 Ill. 2d 470, 170 N.E.2d 582.) However, evidence which tends to prove a fact in issue is admissible even though it discloses that defendant committed another crime. (*People* v. *Dewey,* 42 Ill. 2d 148, 246 N.E.2d 232.) Here, defendant's admission tied her to the crime in question when she stated that "she wasn't very good *at this* * * *." The statement tends to establish her identity as one of the perpetrators of the crime. When we balance the probativeness of this admission against its alleged prejudicial effect, we cannot say that it was so irrelevant to the facts in issue that the trial court should have excluded it.

For the reasons stated above, we affirm the judgment of the circuit court.

Affirmed.

DRUCKER and BARRETT, JJ., concur.

APPENDIX B

UNITED STATES OF AMERICA

State of Illinois)
) ss.
Supreme Court)

At a Term of the Supreme Court, begun and held in Springfield, on Monday, the eighth day of November in the year of our Lord, one thousand nine hundred and seventy-six, within and for the State of Illinois.

PRESENT: DANIEL P. WARD, CHIEF JUSTICE

JUSTICE WALTER V. SCHAEFER

JUSTICE THOMAS E. KLUCZYNSKI

JUSTICE HOWARD C. RYAN

JUSTICE ROBERT C. UNDERWOOD

JUSTICE JOSEPH H. GOLDENHERSH

JUSTICE CASWELL J. CREBS

WILLIAM J. SCOTT, ATTORNEY GENERAL

LOUIE F. DEAN, MARSHAL

ATTEST: CLELL L. WOODS, CLERK

Be It Remembered, that, to-wit: on the 3rd day of December 1976, the same being one of the days of the term of Court aforesaid, the following proceedings were, by said Court, had and entered of record, to-wit:

People State of Illinois,

Respondent

No. 48834 vs.

Sandra L. Ward,

Petitioner

Petition for Leave to Appeal from
Appellate Court First District
61010 — 72-1179

And now on this day the Court having duly considered the Petition for Leave to Appeal herein and being now fully advised of and concerning the premises, doth overrule the prayer of the petition and denies Leave to Appeal herein.